

**James Madison to Edward Everett, February 18, 1823. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.**

**TO EDWARD EVERETT. MAD. MSS.**

Montr., Feby 18, 1823

Dr Sir I have recd., your favor of the 9th, and with it the little pamphlet forwarded at the request of your Brother, for which you will please to accept & to make my acknowledgments.<sup>2</sup>

2 Alexander Hill Everett's *Europe: or a General Survey of the Present Situation of the Principal Powers; with Conjectures on their future Prospects. By a Citizen of the United States.* Boston, 1822.

The pamphlet appears to have very ably & successfully vindicated the construction in the Book on "Europe," to the provision[al] article in Mr. Jay's Treaty. History, if it shd. notice the subject, will assuredly view it in the light in which the "Notes" have placed it; and as affording to England a ground for intercepting American supplies of provisions to her Enemy, and to her Enemy a ground for charging on America a collusion with England for the purpose. That the B. Govt. meant to surrender gratuitously a maritime right of confiscation & to encourage a neutral in illegal supplies of provisions to an Enemy, by adding to their chance of gain an insurance agst. loss, will never be believed. The necessary comment will be that Mr. Jay tho' a man of great ability & perfect rectitude was diverted by a zeal for the object of his Mission, from a critical attention to the terms on

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which it was accomplished. The Treaty was fortunate in the sanction it obtained, and in the turn which circumstances gave to its fate.

Nor was this the only instance of its good fortune. In two others it was saved from mortifying results: in one by the Integrity of the British Courts of Justice, in the other by a cast of the die.

The value of the Article opening our trade with India, depended much on the question whether it authorized an *indirect* trade thither. The question was carried into the Court of King's Bench, where it was decided in our favor; the Judges stating at the same time that the decision was forced upon them by the particular structure of the article against their private conviction as to what was intended. And this decision of that Court was confirmed by the 12 Judges.

In the other instance the question was, whether the Board of Commissioners for deciding on spoliations could take cognizance of American claims, which had been rejected by the British Tribunal in the last resort. The two British Comrs. contended that G. B. could never be understood to submit to any extraneous Tribunal a revision of cases decided by the highest of her own. The American Comrs. Mr. Pinkney & Mr. Gore, argued with great & just force against a construction, which as the Treaty confined the Jurisdiction of the Board to cases where redress was unattainable in the ordinary course of Judicial proceedings would have been fatal not only to the claims which had been rejected by the Tribunal in the last resort but to the residue, which it would be necessary to carry thither through the ordinary course of Justice. The four Comrs. being equally divided; the lot for the 5th., provided by the Treaty for such a contingency, fell on Mr. Trumbull whose casting vote obtained for the American sufferers the large indemnity at stake.

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I speak on these points from Memory alone. There may be therefore if no substantial error, inaccuracies which a sight of the Archives at Washington, or the reports of adjudged Cases in England, would have prevented.

The remarks on the principle, "free ships, free Goods," I take to be fair & well considered. The extravagance of Genet drove our Secy. of State to the ground of the British doctrine. And the Govt. finding it could not depart from that ground without a collision or rather war with G. B. and doubting at least whether the old law of Nations on that subject did not remain in force, never contested the practice under it. The U. S. however in their Treaties have sufficiently thrown their weight into the opposite scale. And such is the number & character of like weights now in it from other powers, that it must preponderate; unless it be admitted that no authority of that kind, tho' coinciding with the dictates of reason, the feelings of humanity & the interest of the civilized world can make or expound a Law of Nations.

With regard to the rule of 1756, it is to be recollected that its original import was very different from the subsequent extensions & adaptations given to it by the belligerent policy of its parent. The rule commenced with confiscating neutral vessels trading between another Belligerent nation & its colonies, on the inference that they were hostile vessels in neutral disguise; and it ended in spoliations on neutrals trading to any ports or in any productions, of belligerents, who had not permitted such a trade in time of peace. The Author of the "Notes" is not wrong in stating that the U. S. did in some sort acquiesce in the exercise of the rule agst. them, that they did not make it a cause of war, and that they were willing on considerations of expediency, to accede to a compromise on the subject. To judge correctly of the Course taken by the Govt. a historical view of the whole of it would be necessary. In a glancing search over the State papers, for the document from which the extract in the pamphlet was made, (it is referred to in a wrong vol: & page, being found in Vol. VI p. 240, & the extract itself not being one free from typographical change of phrase,) my eye caught a short letter of instructions to Mr. Monroe, (vol. VI, p. 180-1,)

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in which the stand taken by the Government is distinctly marked out. The illegality of the British principle is there asserted, nothing *declaratory* in its favor as applied even agst. a neutral trade *direct* between a belligerent Country & its colonies, is permitted; and a stipulated concession on the basis of compromise, is limited by a reference to a former instruction of Jany., 1804, to that of the Russian Treaty of 1781 which protects all colonial produce converted into neutral property. This was in practice all that was essential; the American Capital being then adequate and actually applied to the *purchase* of the colonial produce transported in American vessels.

“The Examination of the subject &c” referred to in the letter of instruction as being forwarded to Mr Monroe, was a stout pamphlet drawn up by the Secretary of State.<sup>1</sup> It was undertaken in consequence of the heavy losses & complaints of Merchants in all our large sea ports under the predatory operation of the extended Rule of 1756.

The pamphlet went into a pretty ample & minute investigation

<sup>1</sup> *Ante*, Vol. VII., p. 204.

of the subject, wch. terminated in a confirmed conviction both of the heresy of the doctrine, and of the enormity of the practice growing out of it. I must add that it detracted much also from the admiration I had been led to bestow on the distinguished Judge of the High Court of Admiralty; not from any discovery of defect in his intellectual Powers, or Judicial Eloquence; but on account of his shifting decisions and abandonment of his independent principles. After setting out wth. the lofty profession of abiding by the same rules of Pub: Law when sitting in London as if a Judge at Stockholm, he was not ashamed to acknowledge that, in expounding that law he shd. regard the Orders in Council of his own Govt. as his Authoritative Guide. These are not his words but do him I believe no injustice. The acknowledgment ought to banish him as “Authority” from every Prize Court in the World.

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I ought to have premised to any remarks on the controversy into which your brother has been drawn, that I have never seen either the Review in wch. his book is criticised, or the pamphlet in wch. it is combated. Having just directed the British Quarterly Review now sent me, to be discontinued, and the N. Amer. Review substituted with the back Nos. for the last year, I may soon be able to do a fuller justice to his reply.

On adverting to the length of this letter, I fear that my pen has recd. an impulse from awakened recollections which I ought more to have controuled. The best now to be done is to add not a word, more than an assurance of my cordial respect & esteem.